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73-330

IN THE

Supreme Court of the United States

October Term, 1973

DOMINGO RUIZ,

Petitioner,

- against -

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

HENRY ROTHBLATT
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(3687)

EXPLANATION OF UNTIMELINESS AND REQUEST TO DISPENSE WITH TIME REQUIREMENTS

We were retained by the Petitioner for the purpose of petitioning the Supreme Court for a Writ of Certiorari.

Upon reading the briefs and opinion in the Court of Appeals, it was decided that the proper action would be to seek rehearing in that court.

A petition for rehearing was timely filed. The petition contained a request for rehearing en banc due to the considerable variance between this decision and prior decisions within the circuit.

Through some error, our office was never notified of the decision of the Court of Appeals, notice having been sent to the petitioner's prior counsel. This notice was never passed on to the petitioner or to our office. We became aware of the decision only when we contacted

the clerk's office.

The petition for a Writ of Certiorari has been filed within a reasonably short time after we became aware of the adverse decision on the petition for rehearing.

Under the circumstances we respectfully request that the Court waive its rules so that the petitioner may be heard on the merits of his case.

Respectfully submitted,

HENRY B. ROTHBLATT

TABLE OF CONTENTS

	Page
Table of Cases	ii
Jurisdiction	2
Questions Presented	3
Statement of the Case	3
Reason for Granting the Petition	7
Conclusion	23
Appendix:	
Opinion of Court of Appeals	A-1
Order of the Court of Appeals affirming the Conviction	A-5
Order of the Court of Appeals denying rehearing	A-7
Order of this Court of Appeals denying rehearing en banc	A-9

TABLE OF CASES

	Page
Glasser v. United States, 315 U.S. 60 (1942)	8
Krulewitch v. United States, 336 U.S. 440 (1949)	8
Litwak v. United States, 344 U.S. 604 (1953)	8
United States v. Cafaro, 455 F.2d 323 (2d.Cir., 1972) cert. den. 92 S.Ct. 1759 (1972)	19
United States v. Calabro, 449 F.2d 885 (2d.Cir. 1971)	9, 11 21
United States v. Fantuzzi, 463 F.2d 683 (2d.Cir., 1972)	14, 21
United States v. Geany, 417 F.2d 1116 (2d.Cir., 1969) cert. den. sub nom Lynch v. United States 397 U.S. 1028 (1970)	8
United States v. Nardone, 127 F.2d. 521 (2d.Cir. 1942)	18
United States v. Ross, 321 F.2d 61 (2d.Cir., 1963) cert. den. 375 U.S. 894 (1964)	20
United States v. Stromberg, 268 F.2d 256 (2d.Cir., 1959) cert. den. sub nom Lessa v. United States 361 U.S. 863 (1960)	7

AUTHORITIES CITED

	Page
Levie, HEARSAY AND CONSPIRACY, 52 Mich. L. Rev. 1161 (1954)	7

IN THE SUPREME COURT OF

THE UNITED STATES

Term, 1973

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DOMINGO RUIZ,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

----------x

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on the 30th day of April, 1973, which affirmed a judgment of conviction upon the verdict of a jury before the

Honorable Charles M. Metzner, in the United States District Court for the Southern District of New York.

Petitioner was convicted of conspiracy to distribute and possess heroin, in violation of Title 21, United States Code, Section 812, 841(a)(1) and 841(b)(1)(A).

Petitioner was sentenced to a term of 5 years.

JURISDICTION

The Judgment of the Circuit Court of Appeals for the Second Circuit was entered on April 30, 1973 in open Court. An opinion was filed.

A petition for rehearing containing a request for rehearing en banc, a stay of mandate and continuance of bail was filed on May 11, 1973. The petition for rehearing and the request for rehearing en banc was denied on June 8, 1973.

Jurisdiction of this Court is in-

voked pursuant to Title 28, United States Code, Section 1254(1).

QUESTION PRESENTED

Is the independent non-heresay evidence that petitioner was part of the conspiracy sufficient to permit the admission into evidence of the heresay declarations of an alleged co-conspirator?

STATEMENT OF THE CASE

On two occasions, April 18, 1972 and May 2, 1972, Detective Anthony Minichiello, working undercover, bought narcotics from Victor Torres. Both transactions occurred in Torres' apartment on 110th Street in New York City.

On April 18 Minichiello and Torres arrived at 110th Street in separate vehicles. Torres left his car and spoke with a group of persons standing on the sidewalk. He returned to Minichiello's

car and told him that the narcotics had been ordered. Several other times Torres left the car and conversed with groups of persons on the street.

Sometime later Detective Minichiello observed the petitioner, Domingo Ruiz standing on the sidewalk near the car in which he and Torres were seated. Mr. Ruiz nodded to Torres. At this time Torres allegedly told Minichiello that Mr. Ruiz was his "man" and that he had the "package". The Court admitted this hearsay statement into evidence over the objection of petitioner's counsel. Torres then left the vehicle to join Ruiz in front of Torres' apartment building.

After conversing briefly the two men entered the building. Shortly thereafter the petitioner left the building alone.

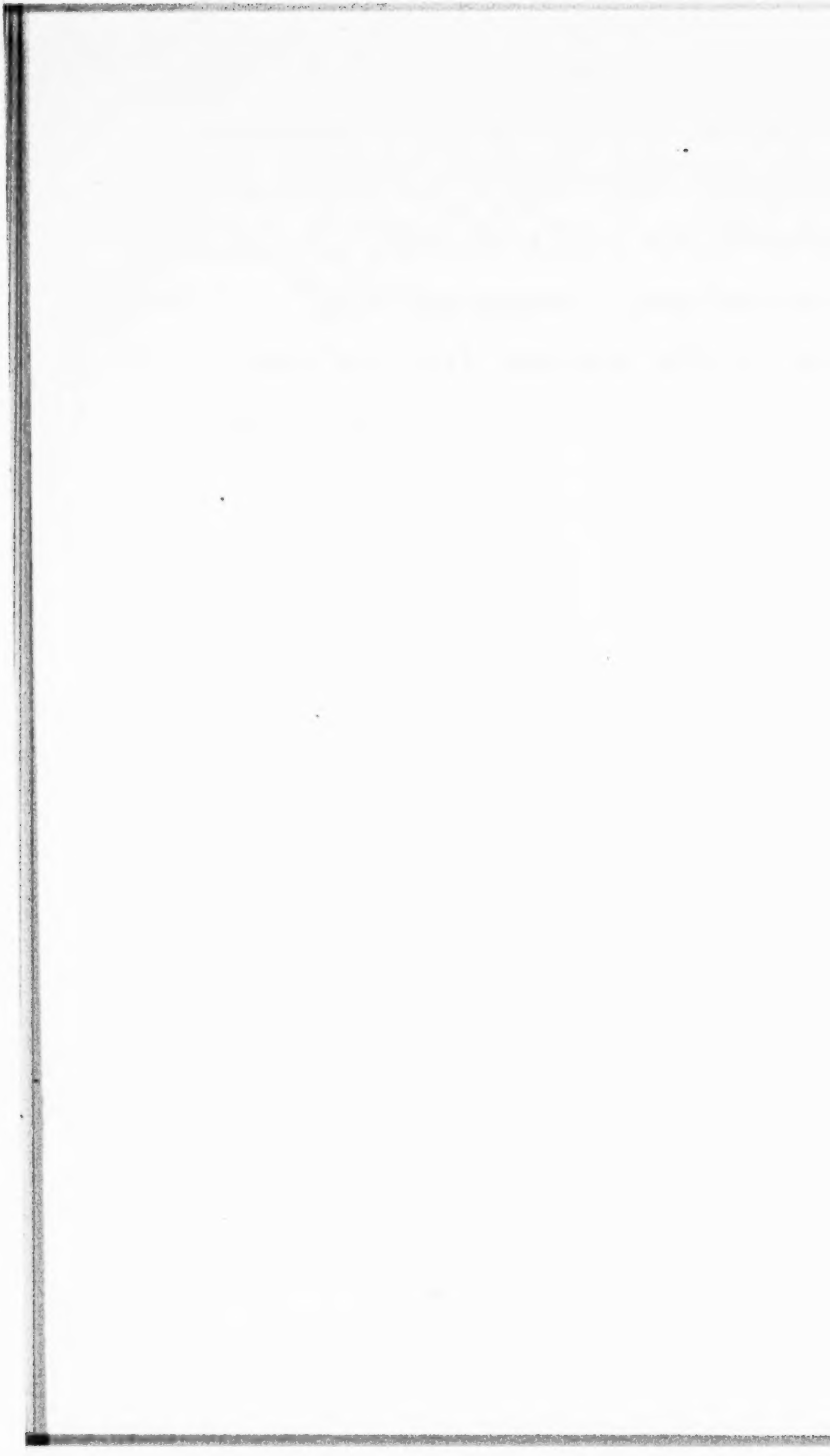
A short time later, Torres emerged from the building and signaled Minichiello to join him. They went up to Torres apart-

ment where the transaction was consummated.

On May 2, 1972 Torres and Minichiello arrived on 110th Street together to transact a second sale. Torres had told Minichiello that the narcotics had been ordered. When they arrived, Torres left the car and went up to his residence. He returned to the car and told Minichiello that the package would arrive in ten minutes. Minichiello observed Domingo Ruiz walking along the opposite side of the street. The petitioner nodded in the direction of Torres and continued walking.

Torres left the vehicle and again went up to his apartment. He returned to the car and signaled Minichiello to come upstairs. When the two men arrived at Torres' apartment, Torres removed the narcotics from a cupboard and the sale was made.

Neither agent Minichiello nor agent Ronald Furte who had been conducting a



surveillance of Torres' apartment building saw the petitioner enter Victor Torres' building at any time on May 2.

When Torres was arrested he had a slip of paper with the name "Mingo" and the telephone number 534-7972 written on it. Torres also had in his possession 10 or 12 other similar slips of papers with names and numbers written on them. It was stipulated that the petitioner was also known by the name of Mingo. His telephone number was 543-7971.

Victor Torres pleaded guilty to the charges which were brought against him as a result of the transactions described here. He was called to testify at the petitioner's trial. He denied that he had received the narcotics involved from Domingo Ruiz or that he had ever been involved in a narcotics transaction with the petitioner.

REASON FOR GRANTING PETITION

THE INDEPENDENT, NON-HEARSAY EVIDENCE THAT PETITIONER WAS PART OF THE CONSPIRACY WAS INSUFFICIENT TO PERMIT THE ADMISSION INTO EVIDENCE OF THE HEARSAY DECLARATIONS OF AN ALLEGED CO-CONSPIRATOR

The trial court allowed Detective Minichiello to testify to a statement allegedly made by Victor Torres during the course of a crime. The statement tended to implicate the petitioner, Domingo Ruiz, in a conspiracy.

The co-conspirator exemption to the hearsay rule is generally stated as: "Any act or declaration by one co-conspirator committed in furtherance of the conspiracy and during its pendency is admissible against each and every co-conspirator provided that a foundation for its reception is laid by independent proof of the conspiracy." Levie, Hearsay and Conspiracy 52 Mich. L. Rev. note 17

at p. 1161 (1954). Three conditions must be met before such hearsay evidence is deemed admissible: 1) Furtherance; 2) Pendency; and 3) Foundation or independent proof of the existance of the conspiracy and the connection of the declarant and defendant with it. Litwak v. United States 344 U.S. 604 (1953); Krulewitch v. United States 336 U.S. 440 (1949); Glasser v. United States 315 U.S. 60 (1942).

It is the last of the above-named conditions to which the Court's attention is drawn. In United States v. Geany 417 F.2d 1116 (2 Cir. 1969) cert. den. sub nom Lynch v. United States, 397 U.S. 1028, the Court of Appeals for the Second Circuit set forth the inquiry the trial judge must make in determining the admissibility of a co-conspirator's hearsay declarations:

> When the matter is viewed from the standpoint of the trial judge, it may be hard to say more than that he must satisfy himself of the defendant's participation in

> a conspiracy on the basis of the non-hearsay evidence.
>
> 417 F.2d at 1120

and

> ...the judge must determine when all the evidence is in, whether in his view the prosecution has proved participation in the conspiracy, by the defendant against whom the hearsay is offered, by a fair preponderance of the evidence independent of the hearsay utterances.
>
> 417 F.2d at 1120

In United States v. Calabro, 449 F.2d 885 (2 Cir. 1971), the court discussed this "fair preponderance" test.

> However, it is clear that the test of "a fair preponderance of the evidence" established by United States v. Geany, supra, 417 F.2d at 1120, can be satisfied by a lesser amount of proof than is required to justify submission of a conspiracy charge to the jury. As we stated in United States v. Ross, 321 F.2d 61, 68 (2 Cir), cert. denied 375 U.S. 894 (1963), "The amount of proof aliunde as to the existence of the conspiracy

> that is required to render such evidence admissible is not as high as the amount needed to warrant submission of a conspiracy charge to the jury." And in United States v. Ragland, 375 F.2d 471, 477 (2 Cir. 1967), cert. denied, 390 U.S. 925 (1968), Judge Waterman wrote that "The threshold requirement for admissibility is satisfied by a showing of a likelihood of an illicit association between declarant and the defendant although it might later eventuate that evidence so admitted proves to be insufficient to justify submitting to the jury on the issue of defendant's alleged guilty involvement with the declarant." Accord, United States v. Borelli, 336 F.2d 376, 387 (2 Cir. 1964) cert. denied sub nom Mozavano v. United States, 379 U.S. 960 (1965)." At 889.

Mere association between the defendant and the alleged co-conspirator is not sufficient to justify the admission into evidence of the hearsay declaration. The accused must be shown to be a participant in the criminal venture.

> It is true that an association with an alleged conspirator, without more, is insufficient

> to establish the necessary foundation for the admissibility of the incriminating statements...[citations omitted]. The accused must "in some sort associate himself with the venture..." United States v. Peoni, 100 F.2d 401, 402 (2 Cir. 1938). United States v. Pagland, 375 F.2d 471, 477 (2 Cir. 1967) cert. denied, 390 U.S. 925 (1968).

In order to gain a more cogent understanding of the significance of the Court of Appeals decision in this case it is necessary to scrutinize the fact patterns of prior cases. The United States Court of Appeals for the Second Circuit in United States v. Calabro, 449 F.2d 885 (2 Cir. 1971) decided what it considered to be a close question on this issue. The defendant's girlfriend consummated one sale of narcotics to an undercover agent and attempted to consummate a second transaction. Each time the girlfriend met with the undercover agent the defendant Calabro was present. The first time the agents came to the La Barraca Bar which Calabro and his girlfriend frequented, Calabro

asked an unidentified male who his girlfriend was sitting with. He eyed the agents intensely during their conversation and when one agent went to the men's room Calabro and another man followed him and frisked him in the men's room. In addition, Calabro and his girlfriend were seen conferring shortly before she was scheduled to meet the agents to transfer narcotics. In spite of Calabro's suggestive behavior, this Court found the issue of Calabro's participation in the conspiracy by a fair preponderance of the evidence to be a close one.

> In the instant case, there was sufficient evidence to support the trial court's ruling that the government had satisfied this threshold test of admissibility. During the course of the alleged conspiracy, Villanueva and Puga met with the undercover agents on a number of separate occasions. On almost every occasion, Calabro was present or in close proximity to them when discussions regarding sales of narcotics occurred. Moreover, at the most critical

junctures of the conspiracy, Villanueva met with Calabro immediately prior to her meetings with the agents. On August 11, she conversed with Calabro fifteen minutes before her rendezvous with Boccia to consummate the sale of one kilogram of heroin. On August 19, Villanueva and Calabro were seated together at the bar before Villianueva asked Boccia if he wanted to purchase narcotics. Similarly, on September 16, Villanueva met with Calabro minutes before the meeting with Boccia to discuss the sale of a second kilogram of heroin. The trial court's preliminary determination that Calabro participated in the conspiracy is further supported by Calabro's scrutiny of the agents, by his close observation of critical discussions between the agents and Villanueva and Puga, and - of critical importance - by the frisking of Boccia, either by Calabro or by his colleague in Calabro's presence. The trial court was entitled to infer that the purpose of this conduct on the part of Calabro was to assure himself that it was safe to do business with Boccia. While this is a close case, we hold that there was sufficient, independent, non-hearsay evidence to support the trial court's finding that Calabro had "associate[d] himself with the mutual venture." United States v. Peoni,

100 F.2d 401, 402 (2 Cir. 1938).

In United States v. Stromberg, 268 F.2d 256, (2 Cir. 1959), cert. denied sub nom Lessa v. United States, 361 U.S. 863, Samnick and Danis were two customs agents who were seen on various occasions with members of a conspiracy to smuggle narcotics. They made remarks about the ease of smuggling and one of the conspirators stated that Samnick was "one of his customs men". A check was drawn by a conspirator which was said to be for Samnick. Samnick and Danis were frequently in the office of the conspirators and were frequently entertained by them. Samnick also had helped one of the conspirators get an item through customs though it was a legitimate transaction. On this set of facts the court held that the independent non-hearsay evidence was insufficient to warrant admission of hearsay declarations.

In United States v. Fantuzzi, 463 F.2d

683 (2d Cir. 1972) the Court held the following fact pattern to be insufficient. As evidence that a defendant Bruno was a participant in the conspiracy, the prosecution relied upon testimony relating to Bruno's two or three visits in the company of Claudine (a conspirator) to Kitty's (a conspirator) apartment during the week previous to a transaction that took place in Dallas. While Bruno was in the apartment the other members of the conspiracy showed a familiarity with him by referring to him by nicknames and by continuing to sniff cocaine while he was there. There was testimony that on Bruno's first visit to the apartment, upon his seeing a stranger he asked "who is that guy?" and on his second visit to the apartment Lucho and Bruno went into the kitchen where Lucho was overheard to say "You have to wait because the stuff of cocaine is coming soon."

A comparison of the facts in the instant case with those in the decisions above clearly mandates a finding that Mr. Ruiz's participation in the alleged conspiracy has not been shown by a fair preponderance of the evidence as viewed by other courts. In the instant case, not only are petitioner's acts capable of an explanation other than his participation in a conspiracy, the acts are forthrighly innocuous.

Ruiz's acts were susceptible to an explanation of innocence, not only of the conspiracy, but of any crime. Even viewed in conjunction, all of the evidence establishes only that Ruiz knew Torres. There is no evidence whatsoever that this relation was "illicit".

As to the first alleged sale, there is no more reason to assume that Ruiz was the source of the narcotics than that the source was a person in the group Torres

twice spoke to when he arrived at 110th Street.

As to the second sale, all that exists is evidence that Ruiz was present on a crowded street, and that he nodded to Torres. It is simply not true as stated by the government in its brief below that Ruiz repeated his actions of the first sale.

Only a mind poisoned by suspicion could imbue Ruiz's nod with criminal meaning. It is as ambiguous an act as could possibly exist. In this second instance the narcotics were stashed in Torres' apartment. Ruiz was on the street, he nodded to Torres, but there was no evidence that he had entered or left the building despite the surveillence of the house by government agents.

In fact, if one wishes to ponder ambiguities and extract inferences, one can wonder why, if Ruiz's nod to Torres

was a signal that the narcotics were present, it was necessary for Torres to go up to his residence before returning to bring up Minichiello. The testimony is undisputed that at this time Ruiz was definitely not in or near Torres' residence nor did he meet with Torres. As for the slip of paper with Ruiz's phone number on it, two things must be noted. First, the number was incorrect, although similar. That is hardly the type of communication a pusher would have with his supplier. If Torres could not remember the number at least one would expect that he would have the correct telephone number. Secondly, and most important, it is a totally innocent piece of evidence. Again, a pre-disposition to suspicion is necessary to view that slip of paper as evidence of participation in a "concerted mutual venture". United States v. Nardone, 127 F.2d at 523.

Only when the evidence is viewed with

a prejudiced eye can it be said that such non-hearsay evidence as was admitted established the likelihood of an "illicit" relation or evidence of a "concerted mutual venture".

There is no evidence that Ruiz was involved in a narcotics transaction with Torres. All that exists are ambiguous coincidential circumstances which when viewed with a predisposition to find guilt and a desire to draw criminal implications appear suspicious. Such a view of the facts denies Mr. Ruiz the most basic tenet of our system of justice -- the presumption of innocence.

The admission of these statements was certainly not harmless error because Torres' hearsay declarations form the heart of the government's case and can not be considered as merely slight additional evidence of guilt in a case where guilt has been shown by overwhelming proof. See United States v. Cafaro 455 F.2d 323

(2 Cir. 1972) cert. denied 92 S.Ct. 1759.

The fact that Torres was called as a witness for the defense does not alter the error or repair it in any way since Appellant's objection at trial was to the admission of Torres' declarations on the government's case and his motion to dismiss was made at the end of the government's case.

This case should not have gone to the jury and Petitioner's motion to dismiss at the end of the prosecution's case should have been granted. If, as the Second Circuit Court of Appeals has said, the quantum of proof required to send a case to the jury is higher than that required to admit co-conspirator hearsay then where, as here, the amount of proof is insufficient to allow the use of co-conspirator hearsay obviously there was not enough to present the case to the jury. See United States v. Ross, 321 F.2d 61, 68 (2 Cir.)

cert. denied 375 U.S. 894 (1963); United States v. Calabro, 449 F.2d 885 (2 Cir. 1971); United States v. Fantuzzi, 463 F.2d 683 (2 Cir. 1972).

The facts relied upon by the lower courts in admitting Torres' hearsay remark are so meager in comparison to prior cases that this case drastically alters the previously well-grounded rule.

If Mr. Ruiz's nebulous contacts with Torres are sufficient to establish his responsibility for Torres' criminal activities there is no protection for any citizen from criminal liability based on innocent associations with criminal defendants.

The tradition of prior cases required the government to establish the defendant's participation in the conspiracy by a fair preponderance of the evidence as a predicate to the admissibility of hearsay statements by an alleged co-conspirator.

In other words, the government had to establish the defendant's participation in the joint venture, if not beyond a reasonable doubt, at least by dear and convincing evidence.

In this case there was no objective evidence that Mr. Ruiz was involved in a joint venture with Mr. Torres.

Acceptance of the government's position in this case would expand the parameter of the legal quantum of evidence necessary to establish conspiracy to inclusion by mere association. The constitution can not permit a man to be imprisoned for a mere nod of his head. A fair preponderance of the evidence must establish his participation in a criminal endeavor.

Any relaxation of the threshold requirements would allow the unregulated and unreliable use of any defendant's statements against an alleged co-conspirator.

If the government is permitted to rely on guilt by association then every citizen becomes potentially liable for the criminal activities of his neighbors. Certainly it would be a simple proposition for the government to establish that any two persons knew one another, that one had the other's telephone number or that the two men exchanged nods or glances, or even conversed. In these facts there is no evidence of a joint venture which would establish the reliability of an off-hand remark as proof of guilt. Such a position is abhorent to our system of criminal jurisprudence. A defendant must be proven guilty by legal evidence and not by the imputation of the crimes of his neighbors.

CONCLUSION

The petition for certiorari should be granted because the independent, non-hearsay evidence that petitioner was part

of the conspiracy was insufficient to permit the admission into evidence of the heresay declarations of an alleged co-conspirator.

Respectfully submitted,

HENRY B. ROTHBLATT

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 801—September Term, 1972.

(Argued April 19, 1973 Decided April 30, 1973.)

Docket No. 73-1217

UNITED STATES OF AMERICA,

Appellee,

—against—

DOMINGO RUIZ,

Defendant-Appellant.

Before:

CLARK, *Associate Justice,**
WATERMAN and FEINBERG, *Circuit Judges.*

Appeal from jury conviction in United States District Court for the Southern District of New York, Charles M. Metzner, *J.*, for conspiracy to possess heroin with intent to distribute, alleging there was insufficient proof of conspiracy to permit introduction of hearsay evidence.

Affirmed.

J. JEFFREY WEISENFELD, New York, N.Y. *for Defendant-Appellant.*

* Retired Associate Justice of the United States Supreme Court, sitting by designation.

ARTHUR J. VIVIANI, Assistant United States Attorney (Whitney North Seymour, Jr., United States Attorney for the Southern District of New York; John W. Nields, Jr., Assistant United States Attorney, on the brief), *for Appellee.*

PER CURIAM:

Appellant Ruiz was convicted below of conspiracy to distribute heroin. The sole issue in this appeal is whether the government introduced sufficient non-hearsay evidence of conspiracy to justify the admission into evidence of hearsay statements of Victor Torres, an alleged co-conspirator, implicating Ruiz.

On April 18, 1972, undercover police officer Minichiello met Torres for the first time and offered to buy heroin. Upon learning that Minichiello had $1200, Torres led him to a Manhattan address where the latter spoke briefly to a group of people standing on the street beyond the officer's hearing. Torres returned to the car in which Minichiello was waiting and talked about future purchases. Torres spoke with the nearby group a second time and then got into the car with Minichiello. About 20 minutes later Minichiello observed appellant Ruiz standing ten feet from the car. Ruiz looked at Torres and nodded his head at him. At this point Torres stated to Minichiello: "That's my man. He's got the package." Torres left the car, joined Ruiz in front of the former's nearby apartment building, and the two entered together. One minute later Ruiz emerged from the building, followed by Torres a few seconds later. Torres summoned Minichiello from the car, and the two went up to Torres' second floor apartment, where a heroin sale was consummated.

On May 2, 1972, Torres made a second sale to Minichiello. They drove together to Torres' apartment building, where Torres left the car, entered his residence, and returned to the car. While the two waited, Ruiz passed by and nodded to Torres, who left the car without speaking to Ruiz and walked into his residence. Torres returned shortly and summoned Minichiello. They went to Torres' apartment, where Torres removed heroin from a cupboard and sold it to Minichiello for $1200.

When Torres was arrested on May 15, 1972, a search of his person turned up a slip of paper bearing the name "Mingo," Ruiz' nickname, and the telephone number "534-7972," almost identical to Ruiz' number at the time (534-7971).

Ruiz argues specifically that the slip of paper was hearsay and therefore not relevant on the threshold question of whether there was a conspiracy. We disagree. The paper was not introduced to prove the truth or falsity of its contents. It was merely evidence supporting the inference that Torres knew Ruiz and anticipated calling him on the telephone. See *United States* v. *Armone*, 363 F. 2d 385, 404 (2 Cir. 1966).

Ruiz argues generally that there was insufficient evidence of conspiracy, whether or not the slip of paper was hearsay. At the first sale Torres waited until Ruiz arrived to make the heroin sale. Ruiz signalled to him and the two went into Ruiz' residence for only one minute. Immediately thereafter, Torres brought Minichiello in and sold him heroin. Two weeks later a similar pattern of events occurred in connection with the second heroin sale. Torres waited until Ruiz appeared and signalled to him before he took Minichiello into his apartment and made the sale. This evidence was sufficient preponderance to war-

rant a finding of conspiracy by the jury. *United States* v. *Geaney*, 417 F. 2d 1116, 1120 (2 Cir. 1969), cert. denied *sub nom Lynch* v. *United States*, 397 U.S. 1028 (1970).

The judgment is affirmed.

330—5-2-73 USCA—4014

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219

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirtieth day of April one thousand nine hundred and seventy-three.

Present: HON. TOM C. CLARK
Associate Justice

HON. STERRY R. WATERMAN

HON. WILFRED FEINBERG

Circuit Judges,

United States of America,

Plaintiff-Appellee,

v. 73-1217

Victor Manuel Torres and Domingo Ruiz,

Defendants,

Doming Ruiz,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United

States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

/s/ A. DANIEL FUSARO
Clerk

73-1217
UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eighth day of June, one thousand nine hundred and seventy-three.

Present:

HON. TOM C. CLARK,
Associate Justice,

HON. STERRY R. WATERMAN,

HON. WILFRED FEINBERG,

Circuit Judges

- - - - - - - - - - - - - - - - - - - -x

United States of America,

Plaintiff-Appellee,

v.

Victor Manuel Torres and Domingo Ruiz,

Defendants,

Domingo Ruiz,

Defendant-Appellant.

- - - - - - - - - - - - - - - - - - - -x

A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/ A. DANIEL FUSARO
Clerk

73-1217
UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eighth day of June, one thousand nine hundred and seventy-three.

- x

United States of America,

Plaintiff-Appellee,

v.

Victor Manuel Torres and Domingo Ruiz,

Defendants,

Domingo Ruiz,

Defendant-Appellant.

- -x

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant and no active circuit judge having requested that a vote be taken on said suggestion

Upon consideration thereof, it is

Ordered that said petition be and it

hereby is DENIED.

/s/ A. DANIEL FUSARO
Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-330

DOMINGO RUIZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner's sole claim here is that there was not sufficient independent evidence of his participation in the conspiracy to support the admission against him of statements of his co-conspirator.

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of conspiring to distribute and possess heroin in violation of 21 U.S.C. 812, 841(a)(1) and 841(b)(1)(A). He was sentenced to five years' imprisonment. The court of appeals affirmed (Pet. App. A).

The evidence in the case as set forth in the opinion of the court of appeals adequately answers the claim by petitioner that the non-hearsay evidence of his participation in the conspiracy was insufficient. We rely on

that opinion in urging that the petition for a writ of certiorari should be denied.[1]

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1973.

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[1] We note also that the petition for rehearing was denied June 8, 1973, and the petition for a writ of certiorari was not filed until August 22, 1973. It is therefore substantially out of time under Rule 22(2) of the Rules of this Court.

DOJ-1973-10